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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUDOLPH VALDEZ VICARIO, Defendant and Appellant.	E066353 (Super.Ct.No. FWV1303140) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed as modified.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Rudolph Valdez Vicario appeals from the denial of his petition for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act. Defendant believes he is entitled to have five one-year prior prison term enhancements stricken from his current sentence because those prior convictions were reduced to misdemeanors after the passage of Proposition 47. He contends the trial court erred in refusing to resentence him after five of his six prior prison felony convictions were reduced to misdemeanors because the five prior prison terms are now misdemeanors "for all purposes" under the rules of statutory construction of Proposition 47. He also argues Proposition 47 should be applied retroactively at any time even if the matter is final.

We conclude Penal Code[1] section 1170.18, subdivision (k), reflects the voters' intent that, for the narrow class of defendants convicted before Proposition 47 passed but whose convictions were not subject to final judgment when their prior convictions were redesignated misdemeanors, their redesignated offenses cannot be used as the basis for sentencing enhancements in the current case. Accordingly, we modify the judgment.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

II[2]

PROCEDURAL BACKGROUND

In December 2013, defendant was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and unlawful possession of a slungshot (§ 22210). Additionally, he admitted that he suffered six prior prison terms (§ 667.5, subd. (b)), to wit, a 1987 conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), a 1991 conviction for vehicular manslaughter (Pen. Code, § 192, subd. (c)), a 1996 conviction for second degree burglary (§ 459), a 1999 conviction for petty theft with a prior (§ 666), a 2004 conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), and a 2012 conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). On February 11, 2014, defendant was sentenced to a total term of nine years eight months in state prison as follows: the middle term of three years for the assault, plus a consecutive term of eight months for the possession of a slungshot, plus consecutive one-year terms for each of the six prior prison terms pursuant to section 667.5, subdivision (b). Defendant timely appealed.

While defendant's appeal was pending, on November 4, 2014, the voters adopted Proposition 47, the Safe Neighborhoods and Schools Act. (*People v. Rivera* (2015) 233

[2] The underlying facts of this case are not relevant to the purely legal questions presented in this appeal.

Cal.App.4th 1085, 1089 (*Rivera*).) Proposition 47 reduced to misdemeanors certain property and drug crimes that were previously felony wobblers.

In June and August 2015, defendant successfully petitioned the San Bernardino County Superior Court to reclassify as misdemeanors five of his six prior felony convictions that were used to enhance his current sentence. On September 28, 2015, defendant petitioned the trial court requesting his current sentence be reduced pursuant to Proposition 47, contending the five prior prison terms he admitted had been reduced to misdemeanors and should no longer be the basis for sentence enhancements. In short, defendant sought to reduce his aggregate sentence by five years.

On September 29, 2015, this court affirmed the judgment in defendant's current case. (See *People v. Vicario* (Sept. 29, 2015, E060921) [nonpub. opn.].) On December 9, 2015, the California Supreme Court denied defendant's petition for review, and on December 15, 2015, this court issued a remittitur, noting this court's opinion had become final.

Before the judgment was final in this case, on January 8, 2016, the trial court denied defendant's petition.[3] This appeal followed.

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[3] The time for defendant to petition the United States Supreme Court for a writ of certiorari expired 90 days after we issued our remittitur on December 15, 2015 (*Bowles v. Russell* (2007) 551 U.S. 205, 212), and the judgment became final the following day. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [" 'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed' "].) Hence, the judgment in this case was final in March 2016.

III

DISCUSSION

As previously stated, Proposition 47 reduced certain theft and drug crimes from felony wobblers to misdemeanors. (*Rivera, supra*, 233 Cal.App.4th at p. 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id*. at p. 1092.) "Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subd. (f); see *id*., subds. (g)-(h).)" (*Id*. at p. 1093.) "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

Defendant contends the resentencing provisions under section 1170.18 apply retroactively to prior convictions used to enhance the sentence on non-Proposition 47 eligible felonies because, by its terms, a felony wobbler that is reclassified or designated as a misdemeanor "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) The issue of whether a defendant is entitled to be resentenced on a current case after the superior court designates as a misdemeanor a prior conviction used to enhance the current sentence is pending before the California Supreme Court. (*People v.*

Valenzuela (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Jones* (2016) 1 Cal.App.5th 221 (*Jones*), review granted Sept. 14, 2016, S235901; *People v. Evans* (2016) 6 Cal.App.5th 894 (*Evans*), review granted Feb. 22, 2017, S239635.)[4]

We interpret voter initiatives like Proposition 47 de novo, applying the same principles that govern the construction of statutes passed by the Legislature. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.) The basic purpose of statutory interpretation is to determine the intent of the lawmakers so we may effectuate the purpose of the law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) Because Proposition 47 "was enacted by the electorate, it is the voters' intent that controls." (*People v. Park* (2013) 56 Cal.4th 782, 796.) We look first to the text of the statute. When the text is clear and unambiguous, we apply it without recourse to interpretive aids. However, when the text bears more than one reasonable interpretation, we look to the purpose and goals of the statute, the problems it seeks to remedy, public policy, and legislative history or voter pamphlets, as well as the overall statutory scheme of which the statute is a part, any of which may aid us in choosing between rival interpretations. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008; *People v. Rizo* (2000) 22 Cal.4th 681, 685 (*Rizo*).) "If a

[4] Under a recent amendment to rule 8.1115 of the California Rules of Court, we may rely on published appellate court decisions as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

penal statute is still reasonably susceptible to multiple constructions, then we ordinarily adopt the ' "construction which is more favorable to the offender." ' " (*Rizo*, at pp. 685-686.)

The courts have held that reclassification of a prior felony conviction under Proposition 47 applies prospectively to enhancements, and that it does not apply to enhancements of sentences that are final. In *People v. Abdallah* (2016) 246 Cal.App.4th 736 (*Abdallah*), the trial court recalled the defendant's prior conviction for possessing methamphetamine, reclassified the conviction as a misdemeanor under Proposition 47, then sentenced the defendant to a year in jail with credit for time served. (*Abdallah*, at pp. 740-741.) However, when the court sentenced the defendant on his current felony convictions, it imposed a one-year sentence enhancement under section 667.5, subdivision (b), for the same prior conviction. (*Abdallah*, at pp. 740-741.) The Court of Appeal held the trial court erred: "Once the trial court recalled Abdallah's 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at the time of sentencing in this case, Abdallah was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on parole for his prior conviction. [Citations.] Thus, the trial court erred by imposing the one-year sentence enhancement under section 667.5, subdivision (b)." (*Id*. at p. 746.)

In *Jones*, *supra*, 1 Cal.App.5th 221, the defendant pleaded guilty in his current felony case and admitted to suffering a prior prison term for petty theft with a prior

(§ 666). (*Jones*, at p. 225.) The trial court sentenced the defendant to three years in county jail for the current offense and to a consecutive term of one year for the prior prison term. (*Id*. at pp. 225-226.) After passage of Proposition 47, the defendant successfully petitioned to have his prior conviction for petty theft with a prior reclassified as a misdemeanor. (*Jones*, at p. 226.) The defendant then petitioned the court in his current case to reclassify as a misdemeanor a prior conviction for second degree burglary (a prior he did not admit as part of his plea and that the trial court struck), and to reduce his current sentence by one year based on the reclassification of his prior conviction. (*Ibid*.) The trial court denied the request to reduce the sentence. (*Id*. at p. 227.)

In *Jones*, a panel of this court affirmed the denial of the defendant's request for a sentence reduction. This court held the provisions giving Proposition 47 retroactive effect do not apply to enhancements: "The focus of these procedures is redesignation of convictions, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. (§ 1170.18, subds. (a), (b), (f), (g).) No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*Jones*, *supra*, 1 Cal.App.5th at pp. 228-229, italics omitted.)

Relying on section 1170.18, subdivision (k), the defendant in *Jones* argued a reclassified felony conviction is a misdemeanor " 'for all purposes,' " and the trial court was required to reduce his sentence by striking the one-year enhancement. (*Jones*, *supra*, 1 Cal.App.5th at p. 229, italics omitted.) This court disagreed: "We assume, without deciding, that subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves the prospective application of section 1170.18, subdivision (k). The second case, which describes Jones's situation, involves its retroactive application." (*Id*. at p. 229, italics omitted.) Because this court found section 1170.18, subdivision (k), does not apply retroactively to sentence enhancements that are final, this court concluded the trial court correctly denied the defendant's request to reduce his current sentence. (*Jones*, at pp. 229-230.)

The defendant in *Evans*, *supra*, 6 Cal.App.5th 894 was convicted in 2015 of various non-Proposition 47 eligible felonies, and admitted to suffering a strike prior and a prior prison term based on a 2007 conviction for possession of a controlled substance. (*Evans*, at pp. 898-899.) Before sentencing, the defendant petitioned to have his 2007 possession conviction reclassified as a misdemeanor pursuant to Proposition 47, and requested that the sentencing court in his current case strike the one-year prior prison

term enhancement based on the 2007 conviction. The People opposed the request to strike the enhancement, and the court denied the request and subsequently sentenced the defendant to a prison term that included the one-year prior prison term enhancement. (*Evans*, at p. 899.) While the defendant's appeal from the judgment was pending before this court, the trial court granted the defendant's petition and reclassified the 2007 possession conviction as a misdemeanor. (*Ibid*.)

In *Evans*, a panel of this court held expressly what the court assumed to be true in *Jones*—that section 1170.18, subdivision (k), prospectively prohibits use of a reclassified conviction as the basis of a prior prison term enhancement under Penal Code section 667.5, subdivision (b). "The plain language of Proposition 47 . . . explicitly anticipates misdemeanor reclassification will affect the collateral consequences of felony convictions. Among other things, suffering a felony conviction may result in the offender losing the right to vote (Elec. Code, § 2101), losing the right to own or possess a firearm (Pen. Code, § 29800, subd. (a)(1)), being required to provide biological samples to law enforcement for identification purposes (§ 296, subd. (a)(1)), and, if the offender is convicted of a felony in the future, losing probation as a sentencing option (§ 1203, subd. (e)) and being exposed to sentence enhancements (§ 667.5, subd. (b)). To ensure qualified offenders gain relief from those collateral consequences, Section 1170.18[, subdivision](k) directs '[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that

person to own, possess, or have in his or her custody or control any firearm . . . .' (Italics added.)" (*Evans, supra,* 6 Cal.App.5th at pp. 900-901.) This court noted that the broad language in section 1170.18, subdivision (k), of "for all purposes" indicates "the voters intended it to apply to all collateral consequences except firearm possession," (*Evans*, at p. 901) and agreed with the court in *Abdallah*, *supra,* 246 Cal.App.4th at page 746, that "[s]ection 1170.18[, subdivision](k) prohibits a court from imposing an enhancement based on an offense that has already been reclassified a misdemeanor." (*Evans*, at p. 901.)

In addition, this court in *Evans* reiterated the holding in *Jones* that Proposition 47 does not apply retroactively to prior prison term allegations used to enhance sentences that have since become final. (*Evans, supra,* 6 Cal.App.5th at p. 902.) Applying *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), this court concluded Evans was entitled to have his prior prison term enhancement stricken because his sentence was on appeal and, therefore, was not yet final when the trial court reclassified his prior conviction for possession of a controlled substance. "Under *Estrada,* when an amendatory statute mitigates punishment, contains no saving clause, and 'becomes effective prior to the date the judgment of conviction becomes final,' then '[that statute] and not the old statute in effect when the prohibited act was committed, applies.' (*Estrada, supra,* 63 Cal.2d at pp. 744, 748.)" (*Evans*, at pp. 902-903.)

This court concluded the language "for all purposes" found in section 1170.18, subdivision (k) "is broad and not limited by a saving clause that would indicate the voters

intended offenders should continue being punished under the old law. The plain language of the statute therefore indicates the voters intended offenders should be able to avoid punishment for reclassified offenses imposed through Section 667.5[, subdivision](b) enhancements, so long as they are not subject to final judgment. Consistent with this understanding, the statute specifies it does not apply to convictions or sentences that are subject to final judgment. (§ 1170.18, subd. (n) ['Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act'].) We therefore conclude the electorate, in passing Proposition 47, determined the penalties for drug possession crimes like Evans's were too severe and intended to reduce those penalties in every case to which the proposition constitutionally could apply. As a result, offenders may challenge prison prior enhancements based on reclassified convictions so long as the enhanced sentence is not subject to a final judgment." (*Evans*, *supra*, 6 Cal.App.5th at p. 903.) Because the judgment in *Evans* was on appeal and not yet final when the trial court reclassified the defendant's prior conviction, this court held the defendant was entitled to have the prior prison term enhancement stricken from his sentence. (*Id*. at p. 904.)

Here, defendant's judgment had not yet became final when he sought to take advantage of Proposition 47 reclassification and reduce five of his prior felony convictions to misdemeanors. While his appeal was pending before this court, in June and August 2015, defendant successfully petitioned the San Bernardino County Superior Court to reclassify as misdemeanors five of his prior felony convictions that were used to

enhance his current sentence. Subsequently, on September 28, 2015, defendant petitioned the trial court requesting his current sentence be reduced pursuant to Proposition 47, contending the five prior prison terms he admitted had been reduced to misdemeanors and should no longer be the basis for sentence enhancements. The following day, on September 29, 2015, this court affirmed the judgment in defendant's current case. (See *People v. Vicario*, *supra*, E060921.) On December 9, 2015, the California Supreme Court denied defendant's petition for review, and on December 15, 2015, this court issued a remittitur, noting this court's opinion had become final. Before the judgment was final in this case, on January 8, 2016, the trial court denied defendant's petition. As previously noted, the judgment in this case became final 90 days after this court issued the remittitur in defendant's direct appeal (i.e., in mid-March 2016), approximately two months after the trial court denied defendant's petition in his current case. Therefore, as in *Evans*, Proposition 47 provided a means for defendant to mitigate punishment, and he successfully took advantage of the procedure *before his judgment became final.*

Defendant's petition to amend his sentence thus did not seek to apply Proposition 47 in a manner not approved by the voters. "[T]he *Estrada* rule applies to Section 1170.18[, subdivision](k) because Proposition 47 expresses the electorate's determination that we have punished a class of offenders too harshly. That determination implies the benefits of Proposition 47 'should apply to every case to which it constitutionally could apply,' including to pending cases in which judgment is not yet

final." (*Evans*, *supra*, 6 Cal.App.5th at p. 904, citing *Estrada*, *supra*, 63 Cal.2d at p. 745.) Accordingly, defendant is entitled to have the prior prison term enhancements related to those convictions stricken from his current sentence.

IV

DISPOSITION

We strike the five one-year prior prison term enhancements reclassified as misdemeanors from defendant's current sentence. Defendant's sentence is modified to a total term of four years eight months in prison. We direct the trial court to issue an amended abstract of judgment consistent with this opinion and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.